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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-680

HONORABLE WARREN J. FERGUSON, UNITED STATES DISTRICT JUDGE, FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, Honorable Warren J. Ferguson, United States District Judge, for the Central District of California, respectfully prays that Writs of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the Order and Judgment of that Court entered into two consolidated mandamus proceedings on August 20 and 30, 1971. The orders sought to be reviewed issued a mandamus directing the petitioner District Judge to vacate and set aside pleas of guilty which he had accepted to a lesser offense included in the specific offense charged in two criminal cases; to vacate and set aside his order dismissing the indictments; with directions to reinstate the indictments; all this because the prosecutor had not consented to acceptance of the pleas.

Opinions Below.

In four original mandamus proceedings brought by the United States of America in the United States Court of Appeals for the Ninth Circuit against the Hon. William P. Gray, United States District Judge, an opinion of the Court of Appeals was issued. It is reported in 438 F. 2d 1160. The opinion was expressly superseded by an opinion filed August 20, 1971, not yet reported, but which appears in Appendix "A" hereto.[1] No written opinions were rendered by the District Court for the Central District of California.

In an unreported *per curiam* opinion the Court of Appeals held the issues involved in the instant causes (two consolidated mandamus proceedings brought by the United States of America against Hon. Warren J. Ferguson, United States District Judge, respectively Nos. 26633 [Vintere] and 26638 [Lieb] to be "fundamentally the same as those this day resolved in United States of America vs. The Honorable William P. Gray" and, consequently, entered the same type of order as was entered in those cases.[2] This *per curiam* appears in Appendix "B" hereto.

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[1]The differences between the two opinions are largely formal. In reasoning and result they are the same. Professor Moore has commented critically upon the Court's result and reasoning. [See, Moore, *Federal Practice* (2d ed.), vol. 8, 1971 Cum. Supp., pp. 91-95.]

[2]There is a difference of facts. In the cases before Judge Gray the pleas were made and accepted before trial. In the cases before Judge Ferguson, the plea in *Lieb* was made and accepted after the government had completely introduced its evidence; and in *Vintere*, after the government had stated it was not ready to go to trial, thus depriving the defendant of his right to a speedy trial.

Jurisdiction.

The order of the Court of Appeals for the Ninth Circuit granting the writs of mandamus in the instant causes was originally entered on February 23, 1971, but was superseded by an opinion filed August 20, 1971. A timely Petition for Rehearing and suggestion of appropriateness of hearing *en banc* was denied on August 30, 1971 and this Petition for Certiorari is being filed within 90 days of that date. The Petition, therefore, is timely [*United States v. Healy*, 376 U.S. 75, 77-80].

The grounds upon which that jurisdiction is invoked is that the Court of Appeals has approved the encroachment by the Executive Department upon a discretionary act and function of the Judicial Department, by holding that the judicial act of accepting a plea of guilty in a federal criminal case cannot be performed without the prosecutor's consent, thereby violating the distribution of governmental powers effected by the Constitution of the United States; and preventing the consummation of the legal consequences, *e.g.*, among other, jeopardy, usually attendant upon a conviction of guilt. In so doing the Court of Appeals misinterpreted F.R.Cr.P., Rules 10 and 11 in a manner not warranted by their language and decisions of this Court. Thus, several important questions of federal law which should be settled by this Court are raised; and the court below so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. In arriving at the decision that it did the Court of Appeals also

created a conflict of decision among the circuits. [Generally, see Rule 19, 1(a)(b).].

The statutory provision believed to confer jurisdiction upon this Court to review the judgments and decrees in question is 28 U.S. Code, §1254 (1), inasmuch as review is sought of two cases in and from a United States Court of Appeals; and in which the Court of Appeals exercised its jurisdiction to issue writs of mandamus. [See 28 U.S. Code, §1651(a).]

Questions Presented.

1. May a federal court, consistently with the Constitution of the United States, sanction the placing of control in the hands of the Executive Department, represented by the prosecutor, over the performance by a federal District Court of the judicial act of determining whether to accept or reject a criminal defendant's offer to plead guilty to a lesser offense included in the specific offense charged in the indictment?

2. Is it a misinterpretation of F.R.Cr.P., Rules 10, 11 and 31(c), to hold that they do not permit acceptance by the District Court of a plea of guilty to a lesser included offense unless the prosecutor consents?

3. Does the decision of the Court of Appeals conflict with that of the Court of Appeals for the District of Columbia Circuit in *Griffin v. United States*, 405 F. 2d 1378, and that of the Circuit Court for the District of Nebraska in *United States v. Linnier*, 125 Fed. 83?

4. In a jury-waived criminal case in which the defendant has pleaded guilty to a lesser included offense, has jeopardy attached when the trial begins, or, at the latest, when the government has put in its evidence?

Constitutional Provisions and Rules Involved.

1. United States Constitution:

(a) *Article II, sec. 1, cl. 1:* The executive Power shall be vested in a President of the United States of America. He shall hold his Office during the Term of four Years, and, together with the Vice President, chosen for the same Term, be elected, as follows. . . .

(b) *Article III, sec. 1:* The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their continuance in Office.

2. Federal Rules of Criminal Procedure:

Rule 10: Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead.

Rule 11: A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the

plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. (Italics in original)

Rule 31(c): The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

Statement of the Case.

In case No. 26638 (Lieb) in the Court of Appeals, the indictment alleged:

"On or about August 8, 1970, in Los Angeles County, within the Central District of California, defendants DAVID WILLIAM LIEB and LADONNA JOY LIEB, with intent to defraud the United States, knowingly received, concealed and facilitated the transportation and concealment of 96 ounces of refined marihuana (hashish), which said marihuana, as the defendants then and there well knew, theretofore had been imported and brought into the United States contrary to law."

The defendants pleaded not guilty and filed a motion to suppress evidence. They waived trial by jury; evidence was introduced by the Government which then rested its case. The motion to suppress was granted in part and denied in part. After the Government had produced all of its evidence and rested, the defendants offered to plead guilty to a violation of 18 United States Code Section 545 (smuggling merchandise into

the United States). Judge Ferguson accepted the guilty plea and referred the case to the Probation Officer for a report. The Government then filed a petition in the Court of Appeals for a Writ of Mandamus to compel Judge Ferguson to vacate and set aside the plea of guilty to the lesser necessarily included offense and to try the case against the defendants for alleged violation of 21 United States Code, Section 176a.

Similar proceedings against the Honorable William P. Gray, Judge of the United States District Court for the Central District of California were also instituted in the Court of Appeals, involving four cases in which he had accepted pleas of guilty to lesser included offenses. The Opinion of the Court of Appeals rendered in those cases was adopted by the Court of Appeals as the Opinion in the two cases involving petitioner herein.

In case No. 26633 (Vintere) in the Court of Appeals the indictment alleged:

(18 U.S.C. §656)

"On or about February 18, 1969, in Los Angeles County, within the Central District of California, defendant RAOUL CHARLES VINTERE employed as an assistant auditor by United California Bank, Long Beach, California, a member bank and an insured bank as defined in United States Code, Title 18, Section 656, with intent to injure and defraud said bank, unlawfully and wilfully misapplied $800.00 to his own use, being money and funds belonging to said bank and intrusted to its custody and care, in the following manner: defendant, in the course of and by reason of his employment, caused fictitious loan documents to be prepared for one Raymond L. Ross,

in the sum of $907.92, signed the loan documents with the forged signature of Raymond L. Ross, approved the fictitious loan and then deducted the interest and disbursed the proceeds of the loan of $800.00 by check number 1723979 dated February 18, 1969 to Raymond L. Ross, signed the check himself for the bank and subsequently forged the endorsement of Raymond L. Ross on the check and thereafter defendant converted the said money and funds to his own use, thereby causing the said funds to be depleted and lost to said bank."

The defendant first pleaded not guilty and later pleaded guilty to the necessarily included offense of the theft of property not exceeding $100.00 in value. He was placed on probation.

The Government also sought a Writ of Mandamus to compel Judge Ferguson to vacate the acceptance of the plea of guilty and to try the defendant upon the offense charged in the indictment.

On the ground that there was no provision in the Federal Rules of Criminal Procedure for the making or acceptance of a plea of guilty to a lesser included offense, at least without the prosecutor's consent, the Court of Appeals issued a mandamus to Judge Ferguson as prayed for by the government.[3]

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[3]By accepting the pleas the District Judge necessarily held that the offenses to which he accepted the pleas of guilty were included in the respective offense charged. The Court of Appeals seemingly found it unnecessary to question that holding, since it assumed that they were lesser included offenses, as, indeed, they were, for they included some, but not all, of the factual elements necessary to proof of the greater offense. [See, *e.g.*, *Berman v. United States*, 351 U.S. 131, 133-134; *Sansone v. United States*, 380 U.S. 343, 349-350.]

REASONS FOR ALLOWING THE WRITS; AND ARGUMENT IN AMPLIFICATION THEREOF.

I.

The Decision of the Court of Appeals Permits Executive Encroachment Upon Exclusive Judicial Power.

It is a truism of American constitutional history that the Constitution, by design, created three great departments of government, each of which, except for certain specified checks and balances, was to be co-ordinate with and independent of the other. In a note to *Hayburn's Case,* 2 Dall. 409, 410, fn. 2, it is said:

> ". . . the circuit court for the district of New York (consisting of Jay, *Chief Justice,* Cushing, *Justice,* and Duane, District Judge) . . . were thereupon, unanimously of the opinion and agreed,
>
> "That by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from and to oppose encroachments on either."

[See also: *Chicago and S. Air Lines v. Waterman S.S. Corp.,* 333 U.S. 103, 111; *Muskrat v. United States,* 219 U.S. 346, 352-353; *Mississippi v. Johnson,* 74 U.S. (4 Wall.) 475, 500.] The judicial power of the United States is confided exclusively to the Judicial Department. [*U.S. Const.*, art. III, sec. 1.]

In *United States v. Klein,* 13 Wall. 128, 146-148, this Court held that the prescription by the Congress of a rule of decision in a pending case was an unconstitutional encroachment upon the judicial power. The Court said:

> "It is the intention of the Constitution that each of the great co-ordinate departments of the gov-

ernment—the legislative, the executive, and the judicial—shall be, in its sphere, independent . . ."

The executive can no more constitutionally encroach upon the judiciary than can the legislature. Yet it is precisely such an encroachment that the Court of Appeals commanded in the instant causes.

There are "many decisions," an eminent teacher of constitutional law has said, "holding that the courts cannot be deprived of the power to control their proceedings, methods of work . . . and other incidents necessary to the *unfettered* discharge of their judicial duties . . ." [Hall, *Cases on Constitutional Law* (Amer. Casebook Series, West Pub. Co. 1913), p. 81, fn. 2. Italics ours.] Manifestly, the determination whether to accept or reject a plea of guilty is a judicial act; it is a power that is "inherent in its [the court's] very existence—it is necessary to serve the practical ends of the administration of justice. . . ." [*Donnelly v. United States*, 10 Cir., 185 F. 2d 559, 560, *cert. den.* 340 U.S. 949; *Tremblay v. Overholser*, D.C. D.C., 199 F. Supp. 569. See, also, *United States v. Wills*, D.C., D.C. 75 F. Supp. 628, 630, in which the court added that to deny such a power to a court "should require an unambiguous expression on the part of Congress to withhold this authority in specified cases . . ."[4] Acceptance or rejection of a plea of guilty being a judicial act, it is a part of that "judicial power of the United States" which the Constitution has vested exclusively in the judicial department.

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[4]F.R.Cr.P., Rules 10 and 11, upon which the Court of Appeals relied in the case at bar, are far from being an unambiguous expression of intention to withhold the power to accept or reject a plea of guilty to a lesser included offense.

Under the decision of the Court of Appeals, however, that power cannot be exercised without the consent of the executive. There could be no plainer encroachment, we respectfully submit, upon the judicial power. The decision, therefore, cuts away at the very foundation of our tripartitie system of government. "The complete independence of the courts of justice is peculiarly essential in a limited Constitution . . ." [The Federalist (Ford's ed.), p. 520, no. 78 (Hamilton).] It follows that the question of law precipitated by the decision below is pre-eminently of the national importance and significance for which the certiorari procedure was devised.

The converse of the argument just made is, of course, that the judicial department may not encroach upon the executive. That proposition equally follows from the doctrine of separation of powers; the principle of it, therefore, is applicable to the instant question. For an example, see *Newman v. United States*, D.C. Cir., 479 F. 2d 479, 480-481 (opinion for the court by Burger, Circ. J.). See, also, *United States v. Cox*, 5 Cir., 342 F. 2d 167, 171-172, *cert. den.* 381 U.S. 935.

II.

The Court of Appeals Misconceived the Meaning and Effect of F.R.Cr.P., Rules 10, 11 and 31(c).

"It is hardly possible to overstate the importance of the plea of guilty in the administration of criminal justice. 'In all courts, both Federal and State, a great majority of criminal cases are disposed of on pleas of guilty. If every criminal case had to be tried the number of judges would have to be multiplied manifold.' . . ." [C. Wright, *Federal Practice and*

Procedure, vol. 1, §171, p. 354.] It is, we think, fair to say—indeed, at least one Court of Appeals has said—that of the cases disposed of on pleas of guilty, a large number arrive at such a termination by a plea to one count of a multi-count indictment or to a lesser included offense. [*Cortez v. United States*, 9 Cir., 337 F. 2d 699, 701.] So-called "plea bargaining" is today a familiar part of criminal procedure. [See, C. Wright, *op. cit.*, vol. 1, §172, p. 362.] Any rule or interpretation of a rule that will deter the process or materially lessen the number of pleas offered must inevitably strain severely an already over-strained judiciary. The decision below in the instant case is bound to be such a deterrence. The question whether the Federal Rules of Criminal Procedure were correctly interpreted and applied below is, therefore, in the language of this Court's Rule 19, "an important question of federal law which has not been, but should be settled by this court . . ."

(1) The Court of Appeals arrived at its interpretation of these rules by a narrowly literal reading of the language used in them. The defendant, says the court, is called upon "*To plead to the charge* in the indictment or information. He is not called upon to plead to a *lesser* offense that might be included in the charge . . ." (Court's italics.) The difficulty with this reasoning is at least three-fold:

First, if the rules are to be thus literally read, it is extremely significant that there is no requirement for

any participation of the prosecutor in the process or of consent by him. Even without the aid of or reference to any rule, courts have the discretionary power to accept or reject a tendered plea of guilty. [See, *Lynch v. Overholser,* 369 U.S. 705, 719; *United States v. Jackson,* 390 U.S. 570, 584; *North Carolina v. Alford,* 400 U.S. 20, 34-35.] That power ought not be held to have been cut down by the requirement of prosecutorial consent, in the absence of an express and unambiguous provision to that effect.

Second, if prosecutorial consent to acceptance of a plea of guilty to a lesser included offense is inferable notwithstanding the rule's silence, so it is also in respect of an offered plea of guilty to "the charge in the indictment or information." The logical conclusion from the lower court's interpretation is that a plea of guilty to the charged offense also needs the prosecutor's consent to be acceptable; yet no one, we submit, believes that to be the rule.

Third, the interpretation creates an inconsistency between Rules 10 and 11 on the one hand and Rule 31(c) on the other. The latter rule permits conviction of a lesser included offense; and no prosecutorial consent is needed for a jury or judge to arrive at such a disposition of the case. A plea of guilty is the equivalent of, and as conclusive as, a conviction after a plea of not guilty. [*United States v. Swaggerty,* 7 Cir., 218 F. 2d 875, 880; *Kercheval v. United States,* 274 U.S. 220,

223.] An arraignment at which, among other things, the defendant has an opportunity to plead, thereby formulating the issue to be tried, "is a sine qua non to the trial itself . . ." [*Hamilton v. Alabama*, 368 U.S. 52, 54, fn. 4.] If, as the court below thought, Rules 10 and 11 provide only for a plea to the offense charged, from where comes the authority, upon trial on the defendant's plea to *only that* offense, to convict him of a lesser included offense? The answer is that the plea puts the lesser included offense in issue. And, if that is so, it may, and logically should be the subject of a plea specifically directed to it.

(2) The interpretation given the rules below is contrary to that intended by the Advisory Committee framers and by this Court in its approval of the rules thus framed. In its comments and historical notes to the Federal Rules of Criminal Procedure the Advisory Committee, *apropos* Rule 11, said:

> "The court should satisfy itself, by inquiry of the defendant . . . or otherwise . . . that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense *included* therein to which the defendant has pleaded guilty . . ." [18 U.S.C.A., following Rule 11, p. 558. Italics ours.]

That comment has been approvingly quoted and the Committee's notes cited by this Court in *McCarthy v. United States*, 394 U.S. 459, 467; also, *op. cit.*, 394 U.S. at 465 (fn. 13), 469 (fns. 18, 19).

Obviously, a plea to a lesser included offense was within the contemplation of those who wrote and approved the rules.

III.

The Decision Below Creates a Conflict of Decision Among the Circuits.

The essential premise of the decision below is the holding that Rules 10 and 11 contemplate and provide only for a plea to the exact offense charged in the indictment, from which, according to the lower court, it necessarily follows that there can be no acceptance of a plea of guilty to a lesser included offense, at least unless the prosecutor consents. In that connection the court said, all italics court's:

> "The solution to the problem necessarily depends upon a proper construction of Rules 10 and 11 . . .
>
> * * *
>
> ". . . Rule 10, which regulates modern federal arraignment procedure, requires that the *indictment* or *information* be read to the defendant, or that the *substance of the charge* be stated to him. Defendant is then called on '*to plead thereto.*' Of notable significance is the requirement that the defendant is called on to *plead to the charge* in the indictment or information. He is not called upon to plead to a *lesser* offense that might be included in the charge . . ."

That reasoning is in direct conflict with that heretofore employed by other Circuit Courts. Thus, in *Griffin v. United States, supra,* 405 F. 2d at 1380, the Court of Appeals for the District of Columbia, after recognizing the discretionary nature of a court's power to accept a plea of guilty to a lesser included offense, nonetheless ordered acceptance of just such a plea, saying, ". . . a guilty plea should not be refused with-

out good reason even though it be to a lesser included offense . . ."[5]

In *Linnier v. United States, supra*, 125 Fed. at 86, the Circuit Court had no difficulty in requiring acceptance, by the District Court, of a plea of guilty to a lesser included offense.[6] The court said:

> ". . . And the question is in no way met by the fact that the United States Attorney objects to a judgment for manslaughter. Such objection is, in a measure, persuasive but not in the slightest degree legally controlling . . ."

Even the Ninth Circuit, in *Conley v. United States*, 497 F. 2d 45, under an indictment of murder in the first degree, affirmed a conviction upon a plea of guilty to murder in the second degree, without the slightest intimation that there might be any doubt of the District Court's power to accept a plea to a lesser included offense. Similarly, in *North Carolina v. Alford, supra*, 400 U.S. at 38 (fn. 11), this Court upheld acceptance of a plea of guilty to a lesser included offense, even though accompanied by protestations of innocence. The Court noted, without any mention of the supposed necessity for prosecutorial agreement, that Rule 11 "gives a trial judge discretion to refuse to

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[5]There was no objection from the prosecution in the cited case, to acceptance of the plea, but that fact, so far as can be ascertained from the opinion, played no part one way or the other in the conclusion reached by the Court. Furthermore, the rule is entirely silent on any participation by the prosecutor in the procedure of accepting or rejecting a proffered plea of guilty. No inference can properly be drawn, therefore, as to the true meaning of the rule, from the mere fact that the prosecutor, in any particular case, may have consented, or not objected, to acceptance of a plea to a lesser included offense.

[6]The indictment was for murder, the offered guilty plea was to manslaughter.

accept a plea of guilty . . ." Obviously, if refusal of a plan to a lesser included offense is discretionary, *i.e.*, is not compulsorily mandated, acceptance of it is merely the other side of the coin of discretion.

While, as we are aware, there is no compulsion upon Federal courts to follow State law in matters of practice and procedure, it does intensify the conflict of decision created by the court below to notice that its decision is similarly in conflict with the rationale of two analogous and carefully considered opinions of the Supreme Court of California. [See, *People v. Tenorio*, 3 Cal. 3d 89, 473 P. 2d 993, 89 Cal. Rptr. 249; *Esteybar v. Municipal Court*, 5 Cal. 3d 119, ... Cal. Rptr. ....., ... P. 2d .....]

IV.

The Court of Appeals Has Decided an Important Question Relating to When Jeopardy Attaches in a Way That Is in Conflict With Decisions of This Court.

The Court of Appeals noticed a difference in facts between these cases and those involved in the *Gray* cases, but nevertheless decided the former by adopting without change the *Gray* opinion. [See, Appendix "B," *infra.*] The difference in facts, however, was of vital significance on the question whether the defendants in the instant cases had been placed in jeopardy on the respective offenses charged against them. In the *Gray* cases, the pleas were accepted before the trial had begun. There was, therefore, an arguable basis for holding that "any issues relating to double jeopardy are premature . . ." [Appendix "A," p. 8.] In *Lieb*, however, the acceptance did not occur until after the government had completed its evidentiary case; and in *Vintere*, while evidence was not introduced, the trial had begun, but

was not carried through, because the government was not ready for trial. [See, note 2, *supra.*]

In the case of a jury-waived trial, the defendant has been placed in jeopardy when the trial has been entered upon, certainly, at least, when the end result is a conviction. [*Cf., Downum v. United States,* 372 U.S. 734; *Green v. United States,* 355 U.S. 184, 188; *Kepner v. United States,* 195 U.S. 100, 128. See, also, *In re Harron,* 197 Cal. 457, 466-477, 217 Pac. 728, 731-732; *People v. Matiasevich,* 12 Cal. App. 2d Supp. 759, 761, 55 P. 2d 942.] He has been twice placed in jeopardy when as here, he has been put on trial for the charged offense and found guilty of a lesser included offense, for in that situation the conviction necessarily implies acquittal of the greater offense. [*Green v. United States, supra,* 355 U.S. at 190-191; *Price v. Georgia,* 398 U.S. 323, 327.]

The issuance of a mandamus to Judge Ferguson to reinstate the indictment and proceed to trial in each case [Appendix "B," p. 9] is inconsistent with the adopted holding that issues of jeopardy were premature. The mandamus may be construed as impliedly precluding a plea of double jeopardy. Certainly, the question whether jeopardy attached has been clouded for the trial court, even if not precluded by necessary implication.

This consequence of the disposition of the case by the Court of Appeals raises an important question in the administration of the criminal law, because of the disastrous results to the defendants' constitutional privilege against self-incrimination, and to their rights to confront the witnesses and to a jury trial. A plea of guilty necessarily waives all these rights. [*McCarthy v.*

United States, supra, 394 U.S. at 466; *Boykin v. Alabama,* 395 U.S. 238, 242-243.] In permitting such consequences to eventuate—at the very least in not making it clear that they will not eventuate—the Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court and has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's supervisory power.[7] [See, Rule 19, 1, (b).]

Conclusion.

A writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be issued in each of the cases below, to the end that the mandamus of the Court of Appeals may be reviewed and upon that review vacated and set aside; and so that the Court below may proceed to determine the causes without regard to whether the prosecutor did or did not consent to acceptance of the pleas of guilty and otherwise to conform to such interpretation of the relevant rules as this Court may make in its opinion.

Respectfully submitted,

J. E. SIMPSON,
JOSEPH A. BALL,
HERMAN F. SELVIN,
Attorneys for Petitioner.

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[7]There is another departure inherent in the lower court's mode of proceeding. The determination whether to accept a plea of guilty is a discretionary one. It may on occasion be exercised erroneously [*cf., Will v. United States,* 389 U.S. 90, 104], and that is the most that can properly be said of Judge Ferguson's action; but error in the exercise of discretion is not controllable by mandamus. [See, *Will v. United States, supra,* 389 U.S. at 104; *Work v. United States,* 267 U.S. 175.]

APPENDIX "A."

Original Proceedings
Petitions for Writs of Mandamus.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Petitioner vs. The Honorable William P. Gray, United States District Judge, Respondent. No. 26,639, No. 26,641, No. 26,644, No. 26,645.

[August 20, 1971]

Before: MERRILL, DUNIWAY and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge.

These cases have been consolidated for argument and decision. In each case, the respondent, over the objection of the petitioner, accepted a plea of guilty to what he believed was a lesser offense necessarily included in the offense charged in the indictment. The petitioner now demands that we issue a writ of mandamus directed to the respondent, requiring him to set aside the guilty pleas and allow each case to proceed to trial.

FACTUAL BACKGROUND

In Case No. 26,639, defendant Faust was charged by indictment with the offense of possession of stolen mail in violation of 18 U.S.C. § 1708, a felony. In a conference for setting a trial date, defendant's attorney indicated that defendant wished to enter a plea of guilty to the offense of willfully obstructing the mails in violation of 18 U.S.C. § 1701, a misdemeanor. Respondent, over objection by the petitioner, accepted a plea of guilty to the misdemeanor.

In Case No. 26,641, the defendant Ortiz was indicted for the offense of knowingly and willfully stealing and purloining property of the United States having a value in excess of $100.00, in violation of 18 U.S.C. § 641, a felony. Respondent, over the objection of the petitioner, accepted a plea of guilty to the offense of theft of property of the United States having a value of not more than $100.00, a misdemeanor.

In Case No. 26,644, the defendant Bates was charged in a superseding indictment with two offenses, both felonies: (1) obstruction of correspondence in violation of 18 U.S.C. § 1702, and (2) possession of stolen mail in violation of 18 U.S.C. § 1708. Respondent, over the objection of the petitioner, accepted a plea of guilty to a violation of 18 U.S.C. § 1701, a misdemeanor.

In Case No. 26,645, the defendant Reed was indicted on two felony counts charging embezzlement of mail in violation of 18 U.S.C. § 1709. Originally, defendant entered a plea of not guilty and waived trial by jury. Counsel for defendant then represented to respondent that his client would plead guilty to obstruction of the mails in violation of 18 U.S.C. § 1701, a misdemeanor. Respondent, over the objection of the petitioner, accepted a plea of guilty to two counts of violation of the misdemeanor statute.

In each case, the respondent set a sentencing date, denied the government's motion to set the case for trial on the offense or offenses charged in the indictment, and dismissed the original charge.

ISSUE

Simply stated, the fundamental issue before us is whether a defendant may tender, and whether the dis-

trict court may accept, over the objection of the government, a plea of guilty to a lesser offense necessarily included in the offense charged in the indictment.

DISCUSSION

The solution to the problem necessarily depends upon a proper construction of Rules 10 and 11,[1] FRCrimP, read in the light of the entire enactment. The rules under scrutiny provide:

"Rule 10.
ARRAIGNMENT

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

"Rule 11.
PLEAS

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the conse-

[1]As amended February 28, 1966, effective July 1, 1966. [N.B. There was an obvious garble in the slip opinion with which we were supplied. The words "the entire enactment. The rules under scrutiny provide:" appear as part of the court's footnote. But in sense and size of type it is evident they belong in the text where we have put them above.]

quences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

While the rules are not, and were not intended to be, a rigid code having an inflexible meaning irrespective of the circumstances, *Fallen v. United States,* 378 U.S. 139, 142 (1964), they were designed to simplify existing procedure and to make uniform certain practices in all district courts. *United States v. Debrow,* 346 U.S. 374, 376 (1953). A section of a statute [rule] should not be read in isolation from the context of the entire act. In interpreting the rules, a court must not be guided by a single sentence or a word or phrase in a sentence, but should look to provisions of the whole law and to its object and policy. *Richards v. United States,* 369 U.S. 1, 10-11 (1962). Where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning. *United States v. Turley,* 352 U.S. 407, 411-412 (1957).

We find no reason for a distinction between the construction of rules promulgated by the United States Supreme Court under congressional authority and other legislation adopted by the Congress itself.

Armed with these fundamental tenets of construction, we proceed to an analysis of Rule 10, which provides for arraignment. Arraignment is an ancient procedure, the purpose of which is to ". . . inform the ac-

cused of the charge against him and obtain an answer from him. . . ." *Garland v. State of Washington,* 232 U.S. 642, 644 (1914). Historically, it consisted of calling a defendant to the bar, reading the indictment to him or informing him of the charge against him, demanding of him whether he is guilty or not guilty, and entering the plea. It is an important step in a federal criminal case, since it formulates the issue to be tried. *Hamilton v. Alabama,* 368 U.S. 52, 54, n. 4 (1961). Rule 10, which regulates modern federal arraignment procedure, requires that the *indictment* or *information* be read to the defendant, or that the *substance of the charge* be stated to him. Defendant is then called on *"to plead thereto."* Of notable significance is the requirement that defendant is called on to *plead to the charge* in the indictment or information. He is not called upon to plead to a *lesser* offense that might be included in the charge. Nowhere in the rule do we find language which permits the court to state to a defendant the *substance* of an offense, other than the offense charged.

We now turn to Rule 11. Under established rules of construction, we are obliged to construe the provisions of Rule 11 consistently with the provisions of Rule 10. They each deal with the same general subject. Prior to the adoption of the rules an arraingment encompassed, in major part, the substance of both rules. *Garland v. State of Washington, supra.*

Under Rule 11, a defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* There is nothing in the text of Rule 11, nor in the cases construing the rule, which supports the theory that a defendant may, over the objection of

the government, respond to an indictment by pleading guilty to a lesser included offense. To the contrary, Rule 11, when read consistently with Rule 10, requires the defendant when presenting his plea to address himself only to the charges contained in the indictment.

If the framers of the rules had intended to allow a defendant to respond to an indictment by a guilty plea to a lesser offense, and to permit the court to accept such a plea over the objection of the government, they could and would have used language consistent with that intention. That the authors of the rules were sufficiently knowledgeable to insert such language, if they so desired, is demonstrated by the use of similar language in Rule 31(c)[2], which provides that a defendant, after trial, may be found guilty of a lesser included offense. Where a term has been carefully employed in one place and excluded in another, it should not be implied where excluded. *City of Burbank v. General Elec. Co.*, 329 F.2d 825 (9th Cir. 1964).

Rule 31, which allows the trier of fact to find a defendant guilty of a lesser included offense, is no authority for the procedure followed by the respondent herein. A verdict under Rule 31 is entered only after the litigation of the factual issues raised in the indictment. It should be noted that, under the Constitution,[3] the government, as well as the defendant, has

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[2] "Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

[3] Article III, § 2 of the United States Constitution provides, among other things, that: ". . . the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

the right to insist upon a jury determination of those facts. *Singer v. United States*, 380 U.S. 24 (1965). The practice utilized by the respondent would terminate a criminal proceeding prior to the resolution of the factual issues raised by the indictment and would deprive the government of the right of trial by jury. In short, the government would be denied the opportunity to prove the allegations in the indictment and the defendant would be relieved of the responsibility of entering a plea responsive to that indictment. Such a procedure is contrary to the stated purposes of the rules in question.[2a]

We conclude that the plea contemplated by Rules 10 and 11 is a plea to the offense charged in the indictment or information, and that a plea to a lesser included offense may not be tendered, and cannot be accepted by the court, unless the government consents. Even then, the better practice would be for the government to file a superseding information or indictment charging the lesser offense. Hence, under these rules, the respondent had no authority to reduce the charges in the instant cases by accepting the pleas of guilty to the lesser offenses. While this court is deeply concerned with the expeditious disposition of cases on the trial calendars of our district judges, and while we applaud their efforts to find new and innovative methods of keeping abreast of their ever-increasing and highly burdensome case loads, we must call a halt to their well-intentioned efforts when, as here, we find no legal justification for the challenged procedures.

[2a] *Esteybar v. Municipal Court* (June 22, 1971), ___ Cal.3d ___, ___ P.2d ___, ___ Cal. Rptr. ___, cited by amicus in one of the Gray cases involves the constitutionality of a California statute and is otherwise not in point.

In view of our interpretation of Rules 10 and 11, we do not decide whether the actions of the respondent were indeed attempted invasions of the powers of the Executive.[4] Nor do we reach the question of whether the pleas were, in fact, pleas to lesser included offenses, since we have assumed, *arguendo,* that they were. Finally, as we believe that any issues relating to double jeopardy are premature, we do not reach them on this appeal.

In each case, the writ shall issue requiring the respondent to vacate and set aside the plea of guilty and the order dismissing the indictment, with directions to reinstate the indictment and proceed to trial in accordance with established practice and procedure.

This supersedes the opinion reported at 438 F. 2d 1160 (9th Cir. 1971).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

IT IS SO ORDERED.

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[4]For a discussion of this problem see *Newman v. United States,* 382 F. 2d 479, 480-481 (D.C. Cir. 1967); *Smith v. United States,* 375 F. 2d 243, 246-247 (5th Cir. 1967).

APPENDIX "B."

Original Proceedings
Petitions for Writs of Mandamus.

United States Court of Appeals, Ninth Circuit.

United States of America, Petitioner, v. Honorable Warren J. Ferguson, United States District Judge, Respondent. No. 26633, No. 26638.

Before: MERRILL, DUNIWAY and KILKENNY, Circuit Judges.

PER CURIAM:

Although the facts are distinguishable, the issues here presented are fundamentally the same as those this day resolved in United States of America v. The Honorable William P. Gray, United States District Judge.

Consequently, in each of these cases, the writ shall issue requiring the respondent to vacate and set aside the plea of guilty and the order dismissing the indictment, with directions to reinstate the indictment and proceed to trial in each case in accordance with established practice and procedure.

IT IS SO ORDERED.

APPENDIX "C."

Opinion of the Court of Appeals.

(Superseding Appendix "B", supra.)

United States Court of Appeals, Ninth Circuit.

United States of America, Petitioner, v. Honorable Warren J. Ferguson, United States District Judge, Respondent. No. 26633, No. 26638.

Original Proceedings Petitions for Writs of Mandamus.

Filed: Aug. 20, 1971.

Before: MERRILL, DUNIWAY and KILKENNY, Circuit Judges. PER CURIAM:

Although the facts are distinguishable, the issues here presented are fundamentally the same as those this day resolved in United States of America v. The Honorable William P. Gray, United States District Judge.

Consequently, in each of these cases, the writ shall issue requiring the respondent to vacate and set aside the plea of guilty and the order dismissing the indictment, with directions to reinstate the indictment and proceed to trial in each case in accordance with established practice and procedure.

This opinion supersedes the opinion filed February 23, 1971.

IT IS SO ORDERED.

APPENDIX "D."

Order.

United States Court of Appeals, Ninth Circuit. United States of America, Petitioner, v. Honorable Warren J. Ferguson, United States District Judge, Respondent. No. 26633, No. 26638.

On Petition for Rehearing and Suggestion for Rehearing In Banc.

A judge in regular active service having requested that the court be polled on the question of the appropriateness of the suggestion for an in banc hearing, the poll was taken. A majority of the court's judges in active service has determined that a rehearing in banc shall not be granted, and it is so ordered. Two of the judges in active service, Judges Ely and Hufstedler, have directed that it be noted that they would have heard the cause in banc.

Richard H. Chambers
Chief Judge

Endorsed: "Filed: Aug. 30, 1974. Wm. B. Luck, Clerk"]

APPENDIX "E."

(Opinion Feb. 23, 1971 Superseded by Appendix "A.")

United States Court of Appeals, for the Ninth Circuit.

United States of America, Petitioner vs. The Honorable William P. Gray, United States District Judge, Respondent. No. 26,639, No. 26,641, No. 26,644, No. 26,645.

Before MERRILL, DUNIWAY and KILKENNY, Circuit Judges.

KILKENNY, Circuit Judge.

These cases have been consolidated for argument and decision. In each case, the respondent, over the objection of the petitioner, accepted a plea of guilty to what he believed was a lesser offense necessarily included in the offense charged in the indictment. The petitioner now demands that we issue a writ of mandamus directed to the respondent, requiring him to set aside the guilty pleas and allow each case to proceed to trial.

FACTUAL BACKGROUND

In Case No. 26639, defendant Faust was charged by indictment with the offense of possession of stolen mail in violation of 18 U.S.C. § 1708, a felony. In a conference for setting a trial date, defendant's attorney indicated that defendant wished to enter a plea of guilty of the offense of willfully obstructing the mails in violation of 18 U.S.C. § 1701, a misdemeanor. Respondent, over objection by the petitioner, accepted a plea of guilty to the misdemeanor.

In Case No. 26641, the defendant Ortiz was indicted for the offense of knowingly and willfully stealing and purloining property of the United States having a value

in excess of $100.00, in violation of 18 U.S.C. § 641, a felony. Respondent, over the objection of the petitioner, accepted a plea of guilty to the offense of theft of property of the United States having a value of not more than $100.00, a misdemeanor.

In Case No. 26644, the defendant Bates was charged in a superseding indictment with two offenses, both felonies: (1) obstruction of correspondence in violation of 18 U.S.C. § 1702, and (2) possession of stolen mail in violation of 18 U.S.C. § 1708. Respondent, over the objection of the petitioner, accepted a plea of guilty to a violation of 18 U.S.C. § 1701, a misdemeanor.

In Case No. 26645, the defendant Reed was indicted on two felony counts charging embezzlement of mail in violation of 18 U.S.C. § 1709. Originally, defendant entered a plea of not guilty and waived trial by jury. Counsel for defendant then represented to respondent that his client would plead guilty to obstruction of the mails in violation of 18 U.S.C. § 1701, a misdemeanor. Respondent, over the objection of the petitioner, accepted a plea of guilty to two counts of violation of the misdemeanor statute.

In each case, the respondent set a sentencing date, denied the government's motion to set the case for trial on the offense or offenses charged in the indictment, and dismissed the original charge.

ISSUE

Simply stated, the fundamental issue before us is whether a district court, without the consent of the government, may accept a plea of guilty to a lesser offense necessarily included in the offense charged in the indictment.

DISCUSSION

The solution to the problem necessarily depends upon a proper construction of Rules 10 and 11,[1] F.R. Crim.P., read in the light of the entire enactment. The rules under scrutiny provide:

"Rule 10.

Arraignment

Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to him the substance of the charge and calling on him to plead thereto. He shall be given a copy of the indictment or information before he is called upon to plead."

"Rule 11.

Pleas

A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead, or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

While the rules are not, and were not intended to be, a rigid code having an inflexible meaning irrespective

[1]As amended February 28, 1966, effective July 1, 1966.

of the circumstances, Fallen v. United States, 378 U.S. 139, 142, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964), they were designed to simplify existing procedure and to make uniform certain practices in all district courts. United States v. Debrow, 346 U.S. 374, 376, 74 S.Ct. 113, 98 L.Ed. 92 (1953). A section of a statute [rule] should not be read in isolation from the context of the entire act. In interpreting the rules, a court must not be guided by a single sentence or a word or phrase in a sentence, but should look to provisions of the whole law and to its object and policy. Richards v. United States, 369 U.S. 1, 10-11, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962). Where a federal criminal statute uses a common law term of established meaning without otherwise defining it, the general practice is to give that term its common law meaning. United States v. Turley, 352 U.S. 407, 411-412, 77 S.Ct. 397, 1 L.Ed.2d 430 (1957).

We find no reason for a distinction between the construction of rules promulgated by the United States Supreme Court under congressional authority and other legislation adopted by the Congress itself.

Armed with these fundamental tenets of construction, we proceed to an analysis of Rule 10, which provides for arraignment. Arraignment is an ancient procedure, the purpose of which is to "* * * inform the accused of the charge against him and obtain an answer from him. * * *" Garland v. State of Washington, 232 U.S. 642, 644, 34 S.Ct. 456, 457, 58 L.Ed. 772 (1914). Historically, it consisted of calling a defendant to the bar, reading the indictment to him or informing him of the charge against him, demanding of him whether he is guilty or not guilty, and entering the plea. It is an important step in a federal criminal case,

since it formulates the issue to be tried. Hamilton v. Alabama, 368 U.S. 52, 54, n. 4, 82 S.Ct. 157, 7 L. Ed.2d 114 (1961). Rule 10, which regulates modern federal arraignment procedure, requires that the *indictment* or *information* be read to the defendant, or that the *substance of the charge* be stated to him. Defendant is then called on "*to plead thereto.*" Of notable significance is the requirement that defendant is called on to *plead to the charge* in the indictment or information. He is not called upon to plead to a *lesser* offense that might be included in the charge. Nowhere in the rule do we find language which permits the court to state to a defendant the *substance* of an offense, other than the offense charged.

We now turn to Rule 11. Under established rules of construction, we are obliged to construe the provisions of Rule 11 consistently with the provisions of Rule 10. They each deal with the same general subject. Prior to the adoption of the rules an arraignment encompassed, in major part, the substance of both rules. Garland v. State of Washington, *supra.*

Under Rule 11, a defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* There is nothing in the text of Rule 11, nor in the cases construing the rule, which supports the theory that a defendant may respond to an indictment by pleading guilty to a lesser included offense. To the contrary, Rule 11, when read consistently with Rule 10, requires the defendant when presenting his plea to address himself only to the charges contained in the indictment.

If the framers of the rules had intended to allow a defendant to respond to an indictment by pleading guilty to a lesser offense, we believe they would have

used language consistent with that intention. That the authors of the rules were sufficiently knowledgeable to insert such language, if they so desired, is demonstrated by the use of similar language in Rule 31(c),[2] which provides that a defendant, after trial, may be found guilty of a lesser included offense. Where a term has been carefully employed in one place and excluded in another, it should not be implied where excluded. City of Burbank v. General Elec. Co., 329 F.2d 825 (9th Cir. 1964).

Rule 31, which allows the trier of fact to find a defendant guilty of a lesser included offense, is no authority for the procedure followed by the respondent herein. A verdict under Rule 31 is entered only after the litigation of the factual issues raised in the indictment. It should be noted that, under the Constitution,[3] the government, as well as the defendant, has the right to insist upon a jury determination of those facts. Singer v. United States, 380 U.S. 24, 85 S.Ct. 783, 13 L.Ed.2d 630 (1965). The practice utilized by the respondent would terminate a criminal proceeding prior to the resolution of the factual issues raised by the indictment and would deprive the government of the right of trial by jury. In short, the government would be denied the opportunity to prove the allegations in the indictment and the defendant would be relieved of the responsibility of entering a plea responsive to that indictment. Such a procedure is contrary to the stated purposes of the rules in question.

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[2]"Conviction of less offense. The defendant may be found guilty of an offense necessarily included in the offense charged or of an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense."

[3]Article III, § 2 of the United States Constitution provides, among other things, that: "* * * the Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; * * *"

We conclude that the plea contemplated by Rules 10 and 11 is a plea to the offense charged in the indictment or information, and that a plea to a lesser included offense is not proper unless the offense charged has been reduced with the consent of the government. Hence, under these rules, the respondent had no authority to reduce the charges in the instant cases by accepting the pleas of guilty to the lesser offenses, while this Court is deeply concerned with the expeditious disposition of cases on the trial calendars of our district judges, and while we applaud their efforts to find new and innovative methods of keeping abreast of their ever-increasing and highly burdensome case loads, we must call a halt to their well-intentioned efforts when, as here, we find no legal justification for the challenged procedures.

In view of our interpretation of Rules 10 and 11, we do not decide whether the actions of the respondent were indeed attempted invasions of the powers of the Executive.[4] Nor do we reach the question of whether the pleas were, in fact, pleas to lesser included offenses, since we have assumed, *arguendo*, that they were. Finally, as we believe that any issues relating to double jeopardy are premature, we do not reach them on this appeal.

In each case, the writ shall issue requiring the respondent to vacate and set aside the plea of guilty and the order dismissing the indictment, with directions to reinstate the indictment and proceed to trial in accordance with established practice and procedure.

It is so ordered.

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[4]For a discussion of this problem see Newman v. United States, 127 U.S.App.D.C. 283, 382 F.2d 479, 480-481 (1967); Smith v. United States, 375 F.2d 243, 246-247 (5th Cir. 1967).

BRIEF F

UNITED

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OPPOS

FOR THE

STATES

IN

SITION

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SUPREME COURT, U.S.

No. 71-680

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

HONORABLE WARREN J. FERGUSON, UNITED STATES DISTRICT JUDGE, FOR THE CENTRAL DISTRICT OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-680

HONORABLE WARREN J. FERGUSON, UNITED STATES DISTRICT JUDGE, FOR THE CENTRAL DISTRICT OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

This case involves a petition for a writ of mandamus filed against petitioner, a district court judge of the United States District Court for the Central District of California, for having accepted, over the objection of the prosecutor, the guilty pleas of two defendants in two separate cases to offenses believed by the judge to be lesser included offenses of the

crimes charged in the indictments. The court of appeals issued the writ in both cases (Pet. App. B).

In one case the indictment charged the defendant (Lieb) with having knowingly received, concealed and facilitated the transportation of 96 ounces of marihuana known by him to have been illegally imported, with intent to defraud, in violation of 21 U.S.C. (1964 ed.) 176a. Both sides waived trial by jury. At the conclusion of the government's evidence, the defendant offered to plead guilty to a violation of 18 U.S.C. 545, which prohibits the smuggling of "any merchandise" into the United States with intent to defraud the United States. Petitioner accepted the plea over the prosecutor's objection.

In the second case, the indictment charged the defendant (Vintere) with having violated 18 U.S.C. 656 in that, as an employee of a federally insured bank, with intent to injure and defraud the bank, he willfully misapplied $800 of the funds of the bank to his own use. He did so, the indictment alleged, by approving a fictitious loan in that amount and by disbursing the loan to his own use by way of a check. Prior to trial, petitioner over the prosecutor's objection, accepted the defendant's plea of guilty to a misdemeanor under 18 U.S.C. 656 of willful misapplication of bank property worth less than $100.

The government filed a petition for a writ of mandamus against petitioner seeking to vacate the pleas of guilty on the ground that he was without authority to accept them. In a *per curiam* opinion, the court of appeals granted the writ, directing reinstatement of the indictments and trials on the original charges.

It held in each case that while the facts were "distinguishable" the issues presented were "fundamentally the same" as those resolved in the government's favor in another mandamus action against District Judge Gray (Pet. App. B). The court's opinion in the *Gray* case is set forth at Pet. App. A; see also, 438 F. 2d 1160.[1]

There is no reason for further review. The opinion of the court below in the *Gray* case shows that, under Rules 10 and 11, Fed.R.Crim.P., there is no authority for the district judge to accept a defendant's plea of guilty to a lesser included offense over the prosecutor's objection, and we rely upon that opinion here. Nor do the rules of the Advisory Committee referred to by petitioner (Pet. 14) show a contrary intent. In addition, as we pointed out in our Memorandum in Opposition in the *Ortiz* case, note 1, *supra*, the acceptance by the district judge of such a plea interferes with the discretion of the Attorney General to determine the offense for which a defendant shall be prosecuted. *Newman* v. *United States*, 382 F. 2d 479 (C.A. D.C.); *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5), certiorari denied, 381 U.S. 935.[2]

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[1] One of the defendants in the *Gray* case (Ortiz) has filed a petition for a writ of certiorari (No. 71-5592 this Term), in response to which we have filed a Memorandum in Opposition. We are providing petitioner with a copy of our Memorandum in Opposition.

[2] The court below, in Judge Gray's case, expressly noted this argument but declined to pass upon it because of its holding with regard to Rules 10 and 11, Fed.R.Crim.P. See Pet. App. A 8, n. 4.

[Footnote continued on page 4]

We note, moreover, that the issue regarding the acceptance of a plea to a lesser included offense without the government's consent is not genuinely presented since neither of the instant cases involves a lesser included offense. As to Lieb, the contention that a charge under 18 U.S.C. 545 can be a lesser included offense to a marihuana charge under 21 U.S.C. (1964 ed.) 176a has been squarely rejected: *United States* v. *Johnston*, 440 F. 2d 389 (C.A. 9), certiorari denied, October 12, 1971 (No. 70-326, this Term); *Olais-Castro* v. *United States*, 416 F. 2d 1155 (C.A. 9). Vintere's case is comparable to that of Ortiz. As we pointed out in our Memorandum in Opposition in that case, the misdemeanor offense of stealing less than $100 of United States property under 18 U.S.C. 641 can qualify as a lesser included offense to the felony charge under that Section only where there is a dispute as to the amount actually

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[2] [Continued]

Contrary to petitioner's assertion, there is no conflict with *Griffin* v. *United States*, 405 F. 2d 1378 (C.A.D.C.), since there the prosecution expressly concurred in the trial court's acceptance of the plea to manslaughter. In *United States* v. *Linnier*, 125 Fed. 83 (D. Nebr.), relied on by petitioner, the trial judge had acquitted the defendant, overturning a jury verdict of murder before accepting a guilty plea to manslaughter. By accepting the plea, the judge, in effect, sat as the trier of fact and acted only after litigation of all the factual issues. This is different than the setting in which the pleas were accepted in the present cases. (Compare the opinion in *Gray*, Pet. App. A 6-7). *North Carolina* v. *Alford*, 400 U.S. 25, was a state case not governed by Rules 10 and 11, Fed.R.Crim.P. In any event, in that case, the prosecutor agreed to accept a plea of guilty to the lesser included offense.

stolen. See *Sansone* v. *United States*, 380 U.S. 343, 350, holding that a "lesser-included offense instruction is only proper where the charged greater offense requires the jury to find a disputed factual element which is not required for conviction of the lesser-included offense." This reasoning is equally applicable to the misdemeanor and felony offenses under 18 U.S.C. 656. Since there was never any showing that the amount willfully misapplied by Vintere might be less than $100—the indictment unequivocally charged the $800 amount as being fraudulently disbursed in a check—his plea also was to a separate charge which was not part of the indictment and which the trial judge had no authority to accept.

Petitioner also contends (Pet. 18) that the issuance of the writ of mandamus by the court of appeals *per se* subjected the defendants to double jeopardy. We point out, however, that Vintere was never in jeopardy. See *United States* v. *Sisson*, 399 U.S. 267, 305; *United States* v. *Jorn*, 400 U.S. 470. Moreover, the defense of double jeopardy will be available to each of the defendants at his subsequent trial; whatever its merits, it should afford no ground for presently attacking the judgment of the court below that petitioner was without authority to accept the pleas. See *United States* v. *Gray*, *supra*, 438 F. 2d at 1164.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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CERTIORARI DENIED
N.C.R.